

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
MAY 2, 2001 Session

**MR. & MRS. WOO-JUN KI, Individually and as parents and next of kin of
JONG-DO KI, Deceased v. STATE OF TENNESSEE**

**Direct Appeal from the Tennessee Claims Commission
No. 98000661; The Honorable Randy Camp, Claims Commissioner**

No. W2000-02364-COA-R3-CV - Filed August 13, 2001

This appeal arises from a tragic fire on the campus of the University of Tennessee at Martin, in which Jong-Do Ki lost his life. Jong-Do Ki's parents, Mr. and Mrs. Woo-Jun Ki, filed suit against the state of Tennessee. The Claims Commissioner found that the State was negligent in that it failed to provide the minimum fire safety requirements mandated by the fire codes it had adopted. The Claims Commissioner also found that the Kis were entitled to recover damages for the wrongful death of their son pursuant to section 20-5-113 of the Tennessee Code. Additionally, the Claims Commissioner found that the Kis were entitled to recover the damages they suffered as a result of Jong-Do Ki's death – the pecuniary value of Jong-Do Ki's life. Because we hold that Jong-Do Ki is the only claimant in this case under section 9-8-307(e) of the Tennessee Code, we reverse in part, and we remand to the Claims Commission for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Claims Commission Affirmed in
Part, Reversed in Part and Remanded**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN GLENN, J., joined.

Paul G. Summers, Attorney General & Reporter, Michael E. Moore, Solicitor General, Kimberly J. Dean, Deputy Attorney General, Nashville, for Appellant

William D. Leader, Jr., Barbara Hawley Smith, Nashville, for Appellees

OPINION

Facts and Procedural History

The facts in this case are well summarized by the Claims Commissioner:

On the night of January 10, 1997, David Bornfriend and Sarah Branscomb, freshman students enrolled at the University of Tennessee Martin, met at a local bar. After talking for a while, they left in Bornfriend's car and returned to Ellington Hall, a dormitory on the University of Tennessee Martin campus. Bornfriend parked his car on the sidewalk at the end of Ellington Hall, commonly known as a "Y" dormitory. Bornfriend was a resident of Ellington Hall. Branscomb was a resident of another dormitory on the University of Tennessee Martin campus.

Bornfriend and Branscomb proceeded to an outside door to Ellington Hall which is secured by a card reader device. The students living in Ellington Hall were able to enter Ellington Hall through the outside security door until midnight by swiping their student identification card in the card reader. After midnight the card reader was inoperable and students were required to enter through the lobby entrance. Bornfriend and Branscomb entered through the outside security door, climbed three flights of steps and proceeded down the third floor hallway to Bornfriend's room, number 306.

Bornfriend and Branscomb entered room 306. Bornfriend's roommate was not in the room. The room window was opened when they entered. Bornfriend turned on his television. Bornfriend and Branscomb sat on Bornfriend's bed which was the closer of the two beds to the window.

Bornfriend and Branscomb smoked a cigarette while they sat on the bed. Bornfriend lit one or more candles. Bornfriend and Branscomb had one or more alcoholic beverages. Bornfriend and Branscomb began kissing and eventually engaged in sexual intercourse. Following intercourse, Bornfriend and Branscomb fell asleep in Bornfriend's bed.

Some time later, Branscomb awoke and woke up Bornfriend, informing him his shirt was on fire. Bornfriend got out of bed and patted and rolled the shirt attempting to extinguish the fire. During this time, the smoke alarm in Bornfriend's room had sounded. Bornfriend picked up the smoke alarm and held it out the window in an attempt to clear it. Bornfriend dropped or threw the smoke alarm to the ground some distance from his own window. Bornfriend and Branscomb then went back to bed.

A short time later, Branscomb awoke again and noticed a larger fire coming from Bornfriend's shirt. Branscomb awakened Bornfriend who made an attempt to put out the fire with Branscomb's help. They could not extinguish the fire, and Bornfriend told Branscomb to leave the room. Branscomb left the room covered only in a towel and ran more than 150 feet down the third floor hallway, down three flights of steps and out the dormitory exit. Branscomb notified no one in Ellington Hall of the fire, nor did she sound any alarm.

Bornfriend then left the room, leaving the door open. He ran nude down the hallway to a friend's room where he put on some clothing and then proceeded to the first floor of Ellington Hall. Bornfriend notified no one in Ellington Hall of the fire nor did he sound an alarm.¹

At some point during the fire, Hoon Namgung, a University of Tennessee Martin student and resident of Room 305, Ellington Hall, was awakened by what he thought was his alarm clock. In actuality, what he heard was his room's smoke alarm and his roommate, Jong-Do Ki awakening him. Jong-Do Ki informed Hoon Namgung that there was a fire. At that time, smoke was coming into Room 305 under the door. Jong-Do Ki told Hoon Namgung that the door was hot. It was becoming difficult to breathe because of the smoke so Jong-Do Ki and Hoon Namgung attempted to breathe through the one window in their room. Because of the way the window was configured, they were unable to get enough fresh air through its small opening. The room continued to fill with smoke. Jong-Do Ki and Hoon Namgung went to the bathroom they shared with another suite in an attempt to exit through the adjoining suite, but the door was locked from the opposite side. There was no response from the adjoining room to their calls for help.

Within a few seconds, the smoke in the bathroom became as thick as that in Room 305. At this point, Hoon Namgung made a decision that they must escape the room if they were to survive. Hoon Namgung opened the bathroom door and went into Room 305. He then proceeded out the door of Room 305 and into the hallway. He could not see Jong-Do Ki because of the thick, dark smoke, but thought that Jong-Do Ki was behind him. When Hoon Namgung entered the hallway, the fire was coming from directly across the hall in Room 306 and had spread into the hallway. Hoon Namgung left the door to Room 305 open. Hoon Namgung attempted to exit the third floor, but lost consciousness and collapsed before he could make his way out. He was later rescued, taken to the hospital and life-flighted to Memphis where he was hospitalized for smoke inhalation.

¹ We note that a portion of David Bornfriend's deposition was read at trial, in which Mr. Bornfriend claimed that at some point after he exited his room, he knocked on other residents' doors to notify them of the fire. The State, however, in its opening statement, claimed that Mr. Bornfriend did nothing to alert anyone about the fire. Apparently, the Claims Commissioner agreed with the State.

Sherman Greer, another University of Tennessee Martin student, who lived in Room 302 on the third floor of Ellington Hall, also awoke during the fire. Although he could smell smoke, he heard no fire or smoke alarms sounding. Sometime before the night of the fire, Mr. Greer's roommate had disabled the smoke alarm in Room 302 by removing the batteries. Mr. Greer and his roommate exited their room and entered the hallway. The hallway was filled with thick, black smoke. Mr. Greer and his roommate got on their hands and knees and crawled toward the exit. After his roommate exited the third floor, Mr. Greer attempted to notify others of the fire by pulling the fire alarm located in the hallway, but the alarm sounded for only a second, making a buzzing sound and then went silent. Mr. Greer then attempted to warn other residents by knocking on doors. He knocked on several doors, but could not get down to Room 305 and 306 due to the extreme heat and smoke. Mr. Greer made his way to the lobby and informed the desk attendant of the fire, who then attempted to call the resident assistant and sounded the general alarm. Mr. Greer made his way back to the third floor again, but could not go down the hall toward Room 305 and 306 due to the smoke and heat. Mr. Greer went back to the lobby and exited the dormitory. A crowd had gathered outside and Mr. Greer and the other students gathered there witnessed a person screaming for help and beating on a third floor window. Black smoke was billowing out the window. Mr. Greer identified that person as Jong-Do Ki.

Mr. Greer notified the firefighters that a person was still on the third floor. The firefighters extinguished the fire and proceeded to search the building for people. While the firefighters were ventilating the building, firefighter Joe T. Pierce, Jr. assisted other firefighters in checking the dormitory rooms for survivors. Pierce entered the open door to Room 305 and found the body of Jong-Do Ki curled in a fetal position under a blanket next to the window where he was last seen. Firefighter Pierce and the other emergency personnel attempted to resuscitate Jong-Do Ki, but they were unsuccessful.

Jong-Do Ki was later pronounced dead from smoke inhalation and carbon monoxide poisoning caused by the fire.

The Claims Commissioner found that the State of Tennessee negligently created and allowed dangerous conditions to exist at Ellington Hall under section 9-8-307(a)(1)(C) of the Tennessee Code by failing to provide the minimum life safety provisions necessary to prevent Jong-Do Ki's death. The State of Tennessee, the City of Martin, and the University of Tennessee had adopted the National Fire Protection Association Fire Prevention Code and the incorporated Life Safety Code (collectively the "Code") which establishes the minimum acceptable level for fire safety and prevention for buildings, including those at the University of Tennessee Martin.

The Claims Commissioner found that the Code that was in effect at the time of the fatal fire mandated that all dormitory sleeping room doors that open onto exit access corridors be self-closing. There were no exceptions to this requirement. The dormitory sleeping rooms at Ellington Hall were not equipped with the required automatic door closers.

The Claims Commissioner also found that the Code required that every sleeping room have at least one primary and one secondary means of escape such as an operable window of sufficient dimensions. The requirement that there be a secondary means of escape, however, is exempted if there is an automatic sprinkler system in place. The evidence established that the window in Jong-Do Ki's room was not sufficient to provide a secondary means of escape. Moreover, Ellington Hall was not equipped with a sprinkler system.

The Claims Commissioner found that Jong-Do Ki died as a result of the State's failure to provide the minimum safety requirements mandated by the Code. The Claims Commissioner further found that the Kis were entitled to recover damages for the wrongful death of their son under section 20-5-113 of the Tennessee Code. Additionally, the Claims Commissioner found that Mr. and Mrs. Ki were entitled to recover the damages that they suffered as a result of Jong-Do Ki's death – the pecuniary value of Jong-Do Ki's life, which includes the Kis' loss of affection, companionship and love of their son.

Due to the foregoing findings, the Claims Commissioner awarded the Kis damages in the amount of \$500,000.00 on behalf of their son. The Claims Commissioner also awarded the Kis \$500,000.00 for the injuries they sustained as a result of Jong-Do Ki's death. Applying comparative fault principles, the Commissioner assessed forty percent of the fault to David Bornfriend and Sarah Branscomb, the occupants of Room 306 who started the fire, and he assessed sixty percent of fault to the State. Accordingly, the Commissioner held that the Kis were entitled to recover \$300,000.00 from the State on behalf of Jong-Do Ki and \$300,000.00 for their own losses.

The State of Tennessee appeals, and raises the following issues, as quoted from their brief, for our review:

- I. Whether the claimants, as parents and next of kin of their deceased son, in a wrongful death claim against the State are limited to a recovery of \$300,000 pursuant to Tenn. Code Ann. §9-8-307(e)?
- II. Whether the claimants, as parents of their deceased son, have a claim for loss of consortium damages for the death of an adult child?

We will examine each issue in turn.

Standard of Review

Our standard of review of the findings of fact by the Commissioner is established by Rule 13(d) of the Tennessee Rules of Appellate Procedure providing: "Unless otherwise required by statute, review of the findings of fact of the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the

preponderance of the evidence is otherwise.” TENN. R. APP. P. 13(d). No presumption of correctness attaches to the trial court’s conclusions of law. See Tennessee Farmers Mutual Ins. Co. v. Moore, 958 S.W.2d 759 (Tenn. Ct. App. 1997).

Law and Analysis

First, the State argues that the recovery below should have been limited to \$300,000.00 pursuant to section 9-8-307(e) of the Tennessee Code. Section 9-8-307(e) of the Tennessee Code states the following, in relevant part: “[f]or causes of action arising in tort, the state shall only be liable for damages up to the sum of three hundred thousand dollars (\$300,000) per claimant and one million dollars (\$1,000,000) per occurrence.” TENN. CODE ANN. § 9-8-307(e) (Supp. 2000). The Claims Commissioner found that:

there [were] two separate claimants, one being Jong-Do Ki, whose personal injury claim survives his death and is brought on his behalf by his parents, the other being Mr. and Mrs. Ki, whose claim is brought for the injuries and losses they suffered as a result of Jong-Do Ki’s death, which include the pecuniary value of his life and loss of consortium damages.

The State argues that the Claims Commissioner erred because there is only one claimant in this case – Jong-Do Ki.

The rule of statutory construction to which all others yield is that the intention of the legislature must prevail. See Plough, Inc. v. Premier Pneumatics, Inc., 660 S.W.2d 495, 498 (Tenn. Ct. App. 1983); City of Humboldt v. Morris, 579 S.W.2d 860, 863 (Tenn. Ct. App. 1978). Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used when read in the context of the entire statute, and without any forced or subtle construction to limit or extend the import of the language. See Worrall v. Kroger Co., 545 S.W.2d 736, 738 (Tenn. 1977); Plough, 660 S.W.2d at 498.

With the aforementioned principles of statutory construction in mind, we now turn to the issue at hand. We note that neither counsel nor our own research has led us to a case that construes the meaning of “claimant” in section 9-8-307(e) of the Tennessee Code.

The Commissioner found that Jordan v. Baptist Three Rivers Hospital, 984 S.W.2d 593 (Tenn. 1999), applied to this case. The Commissioner found that the Jordan court held that “Tennessee’s wrongful death statute creates two separate causes of action.” We disagree. In Jordan, the court clearly stated “[w]e hold that consortium-type damages may be considered when calculating the pecuniary value of a deceased’s life. **This holding does not create a new cause of action but merely refines the term ‘pecuniary value.’**” Id. at 601 (emphasis added). Due to the plain language of the Jordan court’s holding, it is apparent that no new cause of action is created. Further, we note section 20-5-106(a) of the Tennessee Code:

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, **would have had against the wrongdoer**, in case death had not ensued, **shall not abate** or be extinguished by the person's death **but shall pass** to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin. . . .

TENN. CODE ANN. § 20-5-106(a) (1994) (emphasis added). In reading the aforementioned statute and Jordan, it is clear that no new cause of action is created, rather, the deceased person's action simply passes to the deceased's next of kin. See generally Swanson v. Peterson, No. M1999-00241-COA-R3-CV, 2000 WL 48502, at *2 (Tenn. Ct. App. Jan. 21, 2000) (stating that wrongful death actions are intended to preserve the deceased's own cause of action against the wrongdoer for damages from injuries sustained in the death-causing act) (citations omitted).

We also note the case of Hill v. City of Germantown, 31 S.W.3d 234 (Tenn. 2000). Although the Hill decision construed the Governmental Tort Liability Act (GTLA) rather than a statute regarding the Tennessee Claims Commission, we find Hill to be particularly instructive. In Hill, a Germantown, Tennessee, police officer attempted to initiate a traffic stop, but the vehicle accelerated away. See id. at 236. During the chase that ensued, both vehicles reached speeds in excess of ninety miles per hour. See id. After conferring with headquarters, the officers were instructed to stop the pursuit, and they complied. See id. Unfortunately, the other vehicle did not slow down and crossed the center line, colliding with another car. See id. Walterine Crowder was driving the other car, and Deborah Hill and Amberly Hill were passengers. Crowder and Deborah Hill subsequently died at the hospital. See id. Amberly Hill survived with minor physical injuries, but she was later diagnosed as suffering from post-traumatic stress syndrome. See id.

Gregory Hill and Ronald Crowder filed wrongful death claims against the City of Germantown and the officer driving the police car. See id. The trial court found that the officers and the City of Germantown were negligent. See id. Damages were assessed at \$401,249.32 for the death of Walterine Crowder, \$621,071.46 for the death of Deborah Hill, and \$151,270.00 for the personal injuries of Amberly Hill. See id. The court found the defendants to be thirty-five percent at fault. See id. Applying the statutory damages cap in the GTLA, the trial court awarded \$130,000.00 for each of the wrongful death claims, which was the maximum amount of recovery permitted under the statute.²

Plaintiffs appealed, and this court affirmed the trial court's ruling. See id. Among other things, we held that at the time Plaintiffs' causes of actions accrued, loss of consortium damages

² Section 29-20-403(a)(1)(A) of the Tennessee Code states that "[m]inimum limits of not less than one hundred thirty thousand dollars (\$130,000) for bodily injury or death of any one (1) person in any one (1) accident, occurrence or act and not less than three hundred fifty thousand dollars (\$350,000) for bodily injury or death of all persons in any one (1) accident. . . . TENN. CODE ANN. § 29-20-403(a)(1)(A) (2000).

were unavailable in Tennessee, and we held that Jordan could not be applied retroactively. The Plaintiffs appealed and our supreme court granted review.

The Plaintiffs contended that loss of consortium represented a separate injury under the GTLA. Therefore, Plaintiffs argued that the \$130,000.00 damages cap in the GTLA should not apply. Although the supreme court held that Jordan could be applied retroactively, the court declined to remand Plaintiffs' case. See id. at 240. Specifically, our supreme court stated that:

Retroactive application of *Jordan*, however, would not increase Plaintiffs' damages. In *Jordan* we expressly stated, "This holding does not create a new cause of action but merely refines the term 'pecuniary value.'" Pursuant to our statute, loss of consortium damages in a wrongful death claim are wholly contained within the award for wrongful death. Plaintiffs have each received \$130,000, the maximum allowable award under the GTLA per injured person. Loss of consortium damages could not increase the total amount of the award. Accordingly, we decline to remand these cases to the trial court to consider the issue of inclusion of loss of consortium damages in the pecuniary value of decedent's lives.

Id. (internal citations omitted).

In the instant case, we find that there is only one claimant – Jong-Do Ki. Therefore, we find that, consistent with our supreme court's reasoning in Jordan and Hill, there is only one cause of action for wrongful death, which is the cause of action the deceased would have had if he had survived. As a result, we find that the Commissioner erred in holding that Mr. and Mrs. Ki were also claimants and were entitled to recover loss of consortium under section 9-8-307(e) of the Tennessee Code. The maximum recovery in this case under 9-8-307(e) is \$300,000.00 per claimant. Due to our holding that Jong-Do Ki is the only claimant, we partially reverse the decision of the trial court.

Since we hold that there is only one cause of action in the present case, that of Jong-Do Ki for wrongful death, the second issue is pretermitted.

Conclusion

Accordingly, for the aforementioned reasons, we affirm in part and reverse in part the decision of the Claims Commissioner. On remand, the Claims Commissioner is instructed to strike the \$300,000.00 award to Mr. and Mrs. Ki for their loss of consortium. Costs on appeal are taxed one half to the Appellant, State of Tennessee, and one-half to the Appellees, Mr. & Mrs. Woo-Jun Ki, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE